HOMEOWNER'S INSURANCE AND CREDIT SCORE: A CRITICAL RACE THEORY PERSPECTIVE

ROBERT K. YASS, J.D., LL.M.*

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INTRODUCTION

> Throughout U.S. history, the federal government has created a range of programs and policies to support homeownership. However, those programs and policies largely, and in some cases, exclusively, benefited whites. Barred by both overt discrimination and covert structures comprising barriers that are built into financial systems,

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* Adjunct Faculty, University of Connecticut School of Law. The initial version of this paper was prepared for the course Critical Race Theory in the fall of 2018 at the University of Connecticut School of Law taught by Professor Jamelia Morgan, and reflects insights and illuminating class discussions in its development. I am in debt to the work done by Latonia Williams in her consideration of credit score as an impermissible tool in homeowner's insurance underwriting and pricings, and by William E. Murray in his work on redlining both appearing in the Connecticut Insurance Law Journal and cited below. My goal is to appropriately advance their work. I have also been challenged and drawn much conceptual inspiration from the work of Professor Eddie S. Glaude, Jr. and cited below.

> people of color have had great difficulty in accessing opportunities to fully achieve the American dream.[1]

This paper takes up a question which, despite significant consideration by courts and commentators, has yet to yield a satisfactory, much less definitive, resolution. Is the use of credit scoring in the underwriting and pricing of homeowner's insurance appropriate or should it be banned? Obtaining shelter through homeownership generally requires the purchase of hazard insurance, referred to here as homeowner's insurance, particularly if the property is obtained via mortgage financing. Beyond shelter, homeownership has traditionally been one of the surest routes to wealth accumulation and intergenerational transmission of such wealth. In this paper, I consider the role of credit scoring in the process for underwriting and pricing of homeowner's insurance, and I explore whether or not there is an appropriate role for government, at the state or federal level, to break the ongoing log jam over action on this question.

Credit score is a tool used by businesses to evaluate a variety of factors and determine an individual's creditworthiness. "Companies use a mathematical formula–called a scoring model–to create [a] credit score from the information in [the consumers] credit report."[2] Notably, the use of a credit score has been significantly criticized by commentators both as to the factors considered in the scoring process, and the relative weights applied in the algorithm used to deliver the actual score.

Application of Critical Race Theory (CRT) to this assessment has not been found in other materials. In this paper, I seek to use the CRT construct to expand existing criticism of the use of credit score in homeowner's insurance, and to suggest a better frame towards an ultimate conclusion on whether or not to allow the use of credit scores or what constraints to place on its continued use. I recommend that consideration be given to collecting race information from applicants and insureds as a means to determine with most certainty whether or not credit score has a disparate impact based on race. If so, and with CRT analysis, such a finding may

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[1] Lisa Rice, *The Fair Housing Act: A Tool for Expanding Access to Quality Credit*, *in* THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT (Gregory D. Squires ed., 2018).

[2] *Credit Reports and Scores Key Terms*, CFPB, https://www.consumerfinance.gov/consumer-tools/credit-reports-and-scores/answers/key-terms/#credit-score (last visited Oct. 4, 2020).

justify the use of appropriate regulatory tools to ban the use of credit scores in insurance underwriting and pricing. Alternatively, it may justify barring certain factors from being used in credit scoring for homeowner's insurance purposes.

Relevant to this is the process by which a credit score is used in the underwriting and rating of homeowner's insurance. Without becoming a primer on insurance fundamentals, four points should briefly be made. First, insurance underwriting is the process of:

> [S]creening and evaluating applications to determine the degree of risk posed by prospective insureds; [insurers] classify insureds based on the degree of risk posed and set premium levels accordingly; [insurers] experience-rate, or charge premiums for coverage renewals based in part on the insured's loss experience during the previous policy period.[3]

Second, some distinguish underwriting as the initial yes/no decision as to whether or not to provide insurance for the risk from the "rating" process that, for certain coverages (homeowner's coverage is a good example), involves the application of a rating plan that has been filed, and, oftentimes, approved by a state-based insurance regulator to determine the premium a customer will pay.[4] Third, insurers have historically framed discussions on the use of credit information in insurance by labeling what is being used as an "insurance score" rather than a "credit score." While the terms are often used interchangeably a distinction may be maintained.[5] In

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[3] KENNETH S. ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW AND REGULATION: CASES AND MATERIALS 7 (6th ed. 2015).

[4] NAT'L ASS'N OF INS. COMM'RS PRODUCT FILING REVIEW HANDBOOK 8 (Aug. 2016), https://www.naic.org/documents/prod_serv_marketreg_pfr_hdb.pdf.

[5] The Insurance Information Institute, an insurance industry supported organization, explains:

> It is important to note that **insurance scores are not the same as credit scores**. Credit scores predict credit delinquency whereas insurance score predicts insurance losses. Though both are based on a person's credit report, an insurance score does not measure how much money a consumer makes; rather it serves to measure how well an individual *manages* their money. Emphasis is placed on those items associated with credit management patterns proven to correlate most closely with insurance risk, such as outstanding

part, it serves to differentiate the insurance underwriting process from the provision of financial credit. As many of the factors are the same for both, and what differs is the algorithmic calculations, I will use the term "credit score" even when discussing it in an insurance context. Finally, the use of credit scores alone to make a yes/no decision on eligibility for coverage has receded over time. This is due to increasing legislation and regulation that prohibits the sole use of credit score in a binary process for insurance decisions. Insurers are using credit scores in a more granular way as part of a robust rating system that makes the score just one of an increasing number of factors that are variable in weight and impact.[6]

In advance of considering the issues for this paper, note that insurers have a long history of directly using race as a criterion in making underwriting decisions. Early insurer textbooks pointed out that knowing the applicant's racial descent could readily determine whether or not they would be a good risk.[7] The conclusion was that Black applicants were uninsurable and certainly not to be part of the same risk pool as whites.[8] Due to changes in company practices, and law, and regulation, I acknowledge that such blatant practices are no longer in use.

The Insurance Information Institute (III) (a public relations arm of the insurance industry), in describing the use of credit score, points out that every insurer strives to relate rates for insurance policies as closely as it can with the cost of claims. Rates that are too high will force market share losses. Rates that are too low will impact profitability. It is asserted that the majority of consumers will benefit when unsatisfactory insurance risks are not subsidized. Further, it is argued that actuarial studies show that how one manages one's financial affairs are a good predictor of insurance claims and that related insurance scores help differentiate between higher and lower risks. Finally, the III states that "carriers do not use income or race/ethnicity when calculating insurance scores."[9]

> debt, length of credit history, late payments, collections and bankruptcies, and new applications for credit.

Ins. Info. Inst., *Background on: Credit Scoring*, III. (Apr. 8, 2018), https://www.iii.org/article/background-on-credit-scoring.

[6] Latonia Williams, *African American Homeownership and the Dream Deferred: A Disparate Impact Argument Against the Use of Credit Scores in Homeownership Insurance Underwriting*, 15 CONN. INS. L.J. 295, 305 (2008).

[7] *Id.* at 304.

[8] *Id.*

[9] Ins. Info. Inst., *supra* note 5.

In Part I of this paper, I offer a general overview of the importance of housing in meeting basic and extended human needs. Part II provides a review of relevant history and summarizes pertinent case law as to the application of the federal Fair Housing Act (FHA)[10] to homeowner's insurance and includes a description of disparate impact and disparate treatment standards relevant to this consideration. Part III reviews the evolving rule making process at the U.S. Department of Housing and Urban Development (HUD) to define how the FHA applies to the provision of homeowner's insurance and considers the ongoing litigation by insurers to prevent a rule from being finalized. Part IV expands the discussion of the role credit score plays in the availability and affordability of homeowner's insurance and the views of insurers and critics. Part V brings the framework of CRT to this analysis, provides a summary of the subject, and applies it to housing. Part VI suggests that the debate on the use of credit score may be advanced towards a resolution if state insurance department administrative action be taken to require insurers to collect race-based data, from applicants and insureds, to enable more granular correlation studies between credit score results and race. I will consider the use of racial surveys from a CRT standpoint as well as the real-world experience of one state that took the step of collecting race-based demographic information that customers supplied voluntarily to insurers. Part VII summarizes this exploration and makes recommendations for action.

I. THE SIGNIFICANCE OF HOUSING

In Abraham Maslow's Hierarchy of Needs, shelter is one of the most basic human requirements that must be met before an individual can progress up a metaphorical pyramid towards the ultimate goal of reaching self-actualization, at the pyramid's apex. While not necessarily supported by empirical data, it is a popular and simple approach to considering primal human requirements.[11] The identification of shelter, which is housing in our context, as one of the most basic human needs will ultimately be relevant to the CRT analysis.

Beyond considerations of homeownership as a form of shelter, scholars also consider it as key to wealth accumulation. The traditional view of the importance of asset accumulation is that it is "a fundamental

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[10] 42 U.S.C. §§ 3601–19 (2018)

[11] Alma Acevedo, *A Personalistic Appraisal of Maslow's Needs Theory of Motivation: From "Humanistic" Psychology to Integral Humanism,* 148 J. BUS. ETHICS 741, 741–63 (2015), https://doi.org/10.1007/s10551-015-2970-0.

determinant of the long-run well-being of families and individuals."[12] The experience of the 2008 housing bust certainly tempered unbridled faith in this view. However, researchers have found that "even during the tumultuous period from 1999 to 2009 (and) while homeownership is associated with somewhat lower gains in wealth among minorities and lower-income households, these gains are on average still positive and substantial."[13] This view is not universal. Some have suggested that homeownership is not the best route to wealth accumulation, urging renting and investing the difference, as noted in a report on one 2017 study.[14] While this debate may rage, there is also a recognition that other, perhaps intangible, factors add to the significance of homeownership beyond basic shelter and wealth accumulation. "Homeownership's appeal lies strongly in association with having control over one's living situation, the desire to put down roots in a community, and the sense of efficacy and success that is associated with owning."[15]

Studies have found that the rate of homeownership among Blacks in the United States significantly lags behind that of whites. Looking at the fifty years since the report of the National Advisory Commission on Civil Disorders (the Kerner Commission report),[16] a study by the Economic Policy Institute found in 2015 that the Black homeownership rate was just over forty percent (and largely unchanged since 1968) and behind a white homeownership rate of about seventy percent.[17] The same report goes on to

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[12] Christopher E. Herbert, Daniel T. McCue & Rocio Sanchez-Moyano, *Is Homeownership Still an Effective Means of Building Wealth for Low-Income and Minority Households? (Was it Ever?)* 1 (Sept. 2013) (paper originally presented at *Homeownership Built to Last: Lessons from the Housing Crisis on Sustaining Homeownership for Low-Income and Minority Families – A National Symposium).*

[13] *Id.* at 2.

[14] Diana Olick, *Homeownership Doesn't Build Wealth, Study Finds,* CNBC (Nov. 16, 2017, 12:00 AM), https://www.cnbc.com/2017/11/16/homeownership-doesnt-build-wealth-study-finds.html.

[15] Herbert et al., *supra* note 12, at 49 (citation omitted).

[16] NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968) *microformed on* The Nat'l Crim. Just. Reference Serv. (NCJRS), https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf.

[17] Janelle Jones, John Schmitt & Valerie Wilson, *50 Years After the Kerner Commission: African Americans are Better Off in Many Ways but Are Still Disadvantaged by Racial Inequality*, ECON. POL'Y INST. (Feb. 26, 2018), https://www.epi.org/publication/50-years-after-the-kerner-commission/.

note that over the same period average Black family wealth increased almost six times, from $2,467 to $17,409, although Black wealth is still low when compared to the present median of $171,000 for a white family.[18] The significance of housing as to one's life chances cannot be overstated. As Lisa Rice, of the National Fair Housing Alliance, has said, "[a]n address alone, a mere zip code, can dictate a person's life expectancy, educational attainment, personal income, net worth, likelihood of graduating from high school, chances of attending college, health outcomes and probability of getting arrested. Where you live also influences where and how you access credit."[19]

Ultimately, what is relevant to this paper is the effect credit score has on homeownership due to its impact on a person's ability to be approved for (underwriting) and then afford (pricing) the homeowner's insurance product. Studies have established a connection between mortgage lending and racial inequality. Data collected from reports filed under the U.S. Home Mortgage Disclosure Act[20] in 2014 continues to show significant differences in mortgage approvals, at average income levels, for whites (seventy-one percent), Latinx (sixty-two percent), and Blacks (fifty-four percent) with even a significant difference in the higher approval rate for whites in the lowest income level over Blacks in the most affluent level.[21] As discussed in Part VI, aside from being a marker of variable determinations of mortgage qualification among groupings, which may be influenced by factors including credit score, the above data also indicate that matching racial categories against actions by financial institutions may yield data salient to making relevant public policy determinations.

II. RELEVANT HISTORY AND CASE LAW

Over fifty years ago, the FHA was enacted with the aim to eliminate racial discrimination in the sale, rental, or financing of housing.[22] "Congress recognized that widespread racial discrimination in the housing market was preventing integration and interfering with minority access to jobs and

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[18] *Id.*

[19] Rice, *supra* note 1, at 88.

[20] Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, Stat. 1124 (1975) (codified at 12 U.S.C. §§ 2801–09).

[21] Jacob William Faber, *Segregation and the Geography of Creditworthiness: Racial Inequality in a Recovered Mortgage Market*, 28 HOUSING POL'Y DEBATE 215, 224 (2018), https://doi.org/10.1080/10511482.2017.1341944.

[22] *See generally*, 42 U.S.C. §§ 3601–19 (2018).

quality education."[23] As noted in Part I, significant differences in the pattern of homeownership continue to exist between whites and Blacks.

The adoption of the FHA was contentious. Access to quality housing was recognized as a serious gap in the various civil rights laws passed earlier in the 1960's. A version of the FHA was considered by Congress in 1966 but did not advance due to criticism that the legislation lacked Commerce Clause[24] authority, was a violation of property rights, and a manifestation of communism.[25] Urban riots in the summer of 1967, and waning public support for additional civil rights legislation, further eroded the effort.[26] However, a change of heart by Senate Minority Leader Everett Dirksen succeeded in getting the legislation out of the Senate.[27] Perhaps, in part due to the report of the Kerner Commission,[28] and the assassination of Rev. Dr. Martin Luther King, Jr. on April 4, 1968, the legislation was passed on April 10 and signed into law on April 11.[29]

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[23] Dana L. Kaersvang, *The Fair Housing Act and Disparate Impact in Homeowners Insurance*, 104 MICH. L. REV. 1993, 1995 (2006).

[24] U.S. CONST., art. I, § 8, cl. 3.

[25] Rice, *supra* note 1, at 29.

[26] *Id*. at 32.

[27] *Id*. at 34. Observers have suggested that this change in position was motivated by President Johnson bringing political influence to bear in Illinois to guarantee that Dirksen would receive only token Democratic opposition in his upcoming reelection and an agreement to add a "Mrs. Murphy" exception to the bill that would exempt from its scope owner-occupied rental units below a certain size.

[28] Its most dramatic passage on its opening page stating, "Our nation is moving toward two societies, one black, one white–separate and unequal." NAT'L ADVISORY COMM'N ON CIV. DISORDERS, *supra* note 16, at 1. As to housing it stated:

> Federal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation. If this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into the central-city ghettos where is already a critical gap between the needs of the population and the public resources to deal with them.

Id. at 13.

[29] U.S. Dep't. Hous. & Urb. Dev., *History of Fair Housing*, HUD.Gov, https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history (last visited Oct. 4, 2020).

As enacted, the FHA had no real enforcement powers. A 1979 study conducted by HUD concluded that there were two million acts of housing discrimination per year, but only five thousand complaints filed.[30] Even President Ronald Reagan, in his 1983 State of the Union message, called for effective enforcement of the law. Combined with a growing interest in considering fair housing for people with disabilities, the Fair Housing Amendments Act[31] was adopted with broad support and signed into law by President Reagan in 1988.[32]

In response to the decision in *Mackey v. Nationwide Insurance Companies*,[33] concluding that the FHA did not apply to insurance, HUD published a regulation[34] specifying that refusing to provide property or hazard insurance due to, among other characteristics, race was prohibited.[35] Most specifically this applies to Section 3604(a) which declares unlawful anything that makes a dwelling "unavailable."[36] Realizing a gap in how this would be established, HUD sought to define how this would be determined via rule making, as discussed below in Part III.[37]

It is generally viewed as beyond dispute among appellate courts that the FHA applies to disparate impact claims.[38] However, relevant holdings have varied as to the exact mechanism of the test to be applied.[39] As more fully addressed below, the Supreme Court also enunciated the same view in the decision of *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc*.[40] In addition to the HUD regulation, the FHA has also been held to apply to insurers through various decisions at the

[30] Rice, *supra* note 1, at 36

[31] H.R. Res. 1158, 100th Cong. (1988) (enacted).

[32] Rice, *supra* note 1, at 38.

[33] 724 F.2d 419 (4th Cir. 1984).

[34] 24 C.F.R. § 110.70(d)(4) (2020).

[35] William E. Murray, *Homeowners Insurance Redlining: The Inadequacy of Federal Remedies and the Future of the Property Insurance War*, 4 CONN. INS. L.J. 735 (1998).

[36] Relevant language of 42 U.S.C. § 3604 provides: "It shall be unlawful–(a) To refuse . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color . . . ."

[37] Part III considers the recent FHA rulemaking by HUD and related litigation on disparate impact in housing.

[38] Williams, *supra* note 6, at 311.

[39] *Id.* at 312.

[40] 576 U.S. 519 (2015).

appellate court level.[41] However, the Supreme Court has yet to rule on this issue.

Insurers sought refuge from the application of the FHA by arguing that the McCarran-Ferguson Act of 1945[42] shields them from application of the FHA. The relevant provisions of McCarran-Ferguson provide that the business of insurance will be regulated at the state level and, where regulated by a state, federal regulation is not authorized to invalidate, impair, or supersede such state oversight unless the federal law specifically provides for such.[43] While it has been argued that the clear language of McCarran-Ferguson provides this immunity, contrary arguments assert that the initial intent of the law was to create a shield against federal antitrust enforcement and taxation and not to any intent by Congress to protect insurers from the application of later civil rights legislation.[44] "Every circuit court that has considered this issue has held that federal anti-discrimination laws do not conflict with state insurance laws."[45] Chief among these decisions is *DeHoyos v. Allstate Corp.*[46] which "held that the McCarran-Ferguson Act did not preempt a claim that the use of credit scores by [Allstate] violated the anti-discrimination measures of the Fair Housing Act."[47] The complaint in *DeHoyos* asserted that Allstate used a credit scoring methodology to get "non-Caucasian applicants into more expensive policies than those polices into which Caucasian applicants were placed."[48] Allstate sought dismissal

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[41] Williams, *supra* note 6, at 311.
[42] 15 U.S.C. §§ 1011–15 (2018).
[43] 15 U.S.C. § 1012 (2018) in relevant part provides:

> (a) State regulation
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation and taxation of such business.
> (b) Federal regulations
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulation the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . ..

[44] Kaersvang, *supra* note 23, at 2005.
[45] *Id*. at 2006.
[46] 345 F.3d 290 (5th Cir. 2003).
[47] Williams, *supra* note 6, at 321.
[48] DeHoyos, 345 F.3d at 293.

arguing that McCarran-Ferguson preempted the action under the FHA. After losing in the District Court, Allstate appealed on the sole question of McCarran-Ferguson preemption. In holding that the FHA was not preempted by McCarran-Ferguson, the Fifth Circuit noted the controlling Supreme Court decision on this point as *Humana Inc. v. Forsyth*.[49] The *DeHoyos* court articulated a three-part test[50] for whether or not to apply McCarran-Ferguson preemption with the third part being the most relevant to the analysis here.[51] While Allstate asserted that the FHA would impair state rate regulation, the court held that merely regulating insurance contracts or rates would not be sufficient state regulation to activate McCarran-Ferguson preemption. The court called attention to an earlier FHA challenge in Wisconsin in *NAACP v. American Family Mutual Insurance Co.*[52] where the court said, "[i]f Wisconsin wants to authorize redlining, it need only say so."[53] Perhaps this was said with a touch of irony and with the expectation that a state would be unlikely to take up the challenge. One would expect other normative standards of law to be applied if a state so acted. However, it is most clear that, in this isolated comment made in 1992, the court was identifying the level of specificity that must be found to activate McCarran-Ferguson preemption. The court held that general regulation of insurance is not sufficient to claim the federal law was interfering with the state system.[54]

In *Ojo v. Farmers Group, Inc.*,[55] an insured challenged the use of a credit scoring system that made use of "undisclosed factors" and asserted that such factors caused him to pay more for his homeowner's insurance. The court pointed out that the relevant Texas insurance statutory provision, arguably the grounds that would allow for McCarran-Ferguson Act preemption, by its own terms precluded the use of credit scoring factors that would constitute unfair discrimination.[56] The court found nothing in the

[49] 525 U.S. 299 (1999).

[50] DeHoyos, 345 F.3d at 295 (citation omitted) (stating "(1) the federal law in question must not be specifically directed at insurance regulation; (2) there must exist a particular state law (or declared regulatory policy) enacted for the purpose of regulating insurance; and (3) application of the federal law to the controversy in question must invalidate, impair or supersede that state law.").

[51] *Id*. (stating that "application of the federal law to the controversy in question must invalidate, impair or supersede that state law.").

[52] 978 F.2d 287 (7th Cir. 1992).

[53] *Id*. at 297.

[54] *Id.*

[55] 565 F. 3d 1175 (9th Cir. 2009).

[56] TEX. INS. CODE ANN. § 559.051 (West 2005) ("Permissible Use of Credit Scoring").

Texas statute that would conflict with the FHA and remanded the case for further action. A dissent suggested that there was a conflict as the underlying claim was one of disparate impact and the factor would be allowed under Texas law as long as race itself was not used in the rate methodology. This is borne out by the findings of a Texas Department of Insurance study[57] discussed below. The dissent did not find that a sufficient showing of discrimination had been made to allow the matter to move forward and would have dismissed the complaint.[58]

A key element of the analysis is the issue of disparate impact. How it comes to bear upon FHA analysis is significant. In most circuits, one starts from a first principle that the policy under review is facially neutral with the plaintiff bearing the initial burden of establishing that the policy has a greater adverse impact on minorities.[59] Having met this test, the burden shifts to the defendant to assert that there is a legitimate business purpose to the policy. Satisfying this test shifts the burden back to the plaintiff to identify other ways in which the goal could be met without the negative racial impact.[60] While other similar tests have been enunciated, "[i]t has been noted that it is unlikely that the different [tests] will produce substantially different results."[61]

In *Inclusive Communities*,[62] the Supreme Court held that disparate impact claims are "consistent with the FHA's central purpose"[63] and may be recognized under the FHA.[64] Some view *Inclusive Communities* in a limited fashion, and not as an across-the-board endorsement of all approaches to

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[57] TEX. DEP'T. OF INS., REPORT TO THE 79TH LEGISLATURE: USE OF CREDIT INFORMATION BY INSURERS IN TEXAS 1, 14, 18 (Dec. 30, 2004). The study found that Blacks and Hispanics made up an increased percentage in credit score ranges as compared to whites as credit score deteriorated. However, it also found that there was a strong correlation between credit scores and aggregate claims experience. This is more fully discussed in Part IV.

[58] Ojo, 565 F.3d at 1194

[59] Williams, *supra* note 6, at 312.

[60] *Id*.

[61] *Id*. at 315.

[62] Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc., 576 U.S. 519 (2015).

[63] *Id*. at 539.

[64] *Id.* at 545–46 (announcing the decision for the court, Justice Kennedy held "[t]hat disparate-impact claims are cognizable under the Fair Housing Act upon considering the results-oriented language . . . against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose").

proving disparate impact, and not as an easy way to support FHA based claims.[65] *Inclusive Communities* makes clear that liability may not be imposed "based solely on a showing of statistical disparity"[66] and, applying disparate impact analysis, a claim "must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."[67] Of note, this decision did not mention any application to insurance.

To summarize the current state across the federal judiciary, Morgan Williams and Stacy Seicshnaydre have said "[a]dvocates have successfully challenged underwriting variables such as credit scoring for their unjustified adverse effects on neighborhoods of color."[68] However, a final definitive ruling by the Supreme Court, or closure on rulemaking on the FHA on this subject, is still elusive.

For this paper, this issue is being examined through the lens of disparate impact rather than disparate treatment. As explained in the context of employment discrimination by D. Wendy Greene, disparate impact does not require a showing of intent while disparate treatment takes as a given that the defendant has chosen to act in a discriminatory manner.[69] It bears noting that after remanding the case for further action, the District Court ultimately dismissed the disparate impact complaint in *Inclusive Communities* for failure to prove a prima facie case and satisfy the robust causality requirements.[70]

III. CURRENT FHA RULEMAKING AND RELATED LITIGATION

In 2013, suit was filed in the U.S. District Court by the American Insurance Association (AIA) and the National Association of Mutual Insurance Companies (NAMIC) against HUD[71] seeking declaratory and

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[65] Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases after Inclusive Communities*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 685, 690 (2016).

[66] Tex. Dep't Hous. & Cmty. Affs., 576 U.S. 519 at 539–40.

[67] *Id*. at 526.

[68] Morgan Williams & Stacey Seicshnaydre, *The Legacy and the Promise of Disparate Impact*, *in* THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT 169, 174 (Gregory D. Squires ed., 2018).

[69] D. Wendy Greene, *Title VII: What's Hair (and Other Race Based Characteristics) Got to Do With It?*, 79 U. COLO. L. REV. 1355, 1376–77 (2008).

[70] No. 3:08-CV-0546-D, 2016 WL 4494322, at *13 (N.D. Tex. Aug. 26, 2016).

[71] Complaint for Declaratory & Injunctive Relief, Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urb. Dev., No. 1:13-cv-00966-RJL (D.D.C. June 26, 2013)

injunctive relief against the implementation of the final HUD rule entitled "Discriminatory effect prohibited."[72] The rule established the three-part test for determining when a practice with discriminatory effect violates the Fair Housing Act.[73] In other words, it sought to apply the *DeHoyos* disparate impact standard to harmonize the slightly varying rules across the circuits. As described in the complaint, the rule "purports to interpret the Fair Housing Act to prohibit housing-related activities that, although not motivated by intent to discriminate, result in a disparate impact on certain protected groups."[74] It goes on to note that the preamble of the Rule extends disparate impact liability to the "[underwriting] and pricing of homeowner's insurance" and does so for the first time.[75] After a lengthy recitation of the appropriate factors that are taken into consideration in making underwriting and pricing decisions and citing the many state laws that require the use of sound actuarial principles and those reasonably related to expected experience, the plaintiffs argued that "treating similar risks differently for reasons unrelated to actuarial justification is impermissible. Under state insurance codes, that principle is typically referred to as a prohibition against 'unfair discrimination.'"[76] Put another way, plaintiffs argued that insurance underwriting and pricing must be and is color blind. Further, the plaintiffs asserted the applicability of McCarran-Ferguson to this issue and the primacy of state laws to this question.[77]

The FHA rule was promulgated during the pendency of *Magner v. Gallagher*[78] for which the Supreme Court granted certiorari review and was anticipated to be a potential vehicle for undermining the holdings of the many circuits on this question. In what was a political *cause celebre*, the U.S. Department of Justice was alleged to have prevailed upon the City of St. Paul, MN, the petitioner in Manger, to withdraw its petition.[79] St. Paul did

[hereinafter Complaint]. Due to trade association consolidation, this case is now led by NAMIC. Order of Dismissal at 2, Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urb. Dev., No. 1:13-cv-00966-RJL (D.D.C. Mar. 26, 2019).

[72] 24 C.F.R. § 100.500 (2020).

[73] *Id.*

[74] Complaint, *supra* note 71, at ¶ 2.

[75] *Id.* at ¶ 3.

[76] *Id*. at ¶ 24.

[77] *Id*. at ¶ 7.

[78] 565 U.S. 1187 (2012).

[79] Adam Serwer, *The GOP Wants to Use This Bizarre Case to Scuttle Obama's Most Progressive Cabinet Nominee,* MOTHER JONES (Mar. 22,

so in 2012.[80] This cleared the field for the HUD rulemaking, and the elimination of a perceived threat that would undermine the cases to date holding that the FHA was to utilize a disparate-impact test and that it could be made to apply to insurers.[81] A later case,[82] for which certiorari was granted after the commencement of the HUD rulemaking, was similarly settled and withdrawn from Supreme Court consideration.

This NAMIC litigation is still pending as of late January 2021 (the most recent docket entry). In late 2017, the Treasury Department communicated its view that insurers should be exempt from the pending rule as part of a series of papers dealing with the financial services industry. The statement was viewed as a Hail Mary to aid AIA and NAMIC in the long-pending lawsuit.[83]

As noted, the *Inclusive Communities* decision was the vehicle by which the Supreme Court, in a 5-4 decision, held that disparate-impact claims are cognizable under the FHA. However, the holding did not clarify the open question, at least at the Supreme Court level, of whether insurers are bound by this rule. Despite the number of circuit decisions on this

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2013), https://www.motherjones.com/politics/2013/03/thomas-perez-grassley-st-paul-darrell-issa-quid-pro-quo/.

[80] *Id.*

[81] *Id.*

[82] Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action Inc., 571 U.S. 1020 (2013).

[83] Lorraine Woellert, *Trump HUD Vacancy Prompts Insurers to Seek Treasury Help in Pushing Lawsuit*, POLITICO (Oct. 31, 2017, 4:40 PM), https://www.politico.com/story/2017/10/30/trump-hud-vacancy-treasury-lawsuit-244331. As this article states:

> In the insurance case, fair housing advocates say the Treasury recommendation fights years of case law. ‘It's established case law; that's one reason HUD promulgated the disparate impact rule,’ said Lisa Rice, executive vice president of the National Fair Housing Alliance. ‘It was safe for them to do it.’ Several court rulings have gone against the insurance industry after the alliance and other fair-housing groups showed ‘statistically significant’ harm caused by industry policies, Rice said. ‘There are dozens of cases in which disparate impact has been alleged. The insurance industry has lost,’ Rice said. ‘This is an issue that the insurance industry has been raising since the 1990s; it's not a new issue at all.’

Id.

question, the HUD initial rulemaking, rule challenges, and more recent efforts by HUD (discussed below) are where the issue is currently most intensely contested.

The HUD rule on the FHA is ostensibly in effect. In October 2016, HUD supplemented the 2013 rule to specify the application of the FHA's discriminatory effects standard to insurers and determined "that categorical exemptions or safe harbors for insurance practices are unworkable and inconsistent with the broad fair housing obligations embodied in the [FHA]."[84] However, in June 2018, HUD threw a wrench into the works by announcing that it would now "reconsider" the 2013 rule and the 2016 supplement to see if changes were necessitated because of the *Inclusive Communities* decision.[85] Lawsuits based on the range of circuit court holdings, the decision in *Inclusive Communities*, and the HUD rule and supplement could obviously continue to advance. In fact, the General Counsel of AIA was quoted to say, "[w]e have companies that are being sued by fair housing advocates in federal court . . . . We're hoping [the Treasury policy view] will help facilitate a break."[86]

In an effort to move this to a resolution, HUD indicated that further rule making would be commenced. In August 2019, new rulemaking was undertaken with the ostensible goal of integrating prior rulemaking and the Supreme Court decision in *Inclusive Communities*.[87] The proposed rule would repeal the 2013 rule, and in HUD's view align better with *Inclusive Communities* and state laws regulating insurers and provide for certain defenses.[88] After accepting comments HUD published a final version of the rule effective October 2020.[89] The new HUD rule certainly clouds forward progress on this issue at the federal level. "Critics of the rule change say that

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[84] Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance, 81 Fed. Reg. 69012 (proposed Oct. 5, 2016) (to be codified at 24 C.F.R. pt. 100).

[85] Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 83 Fed. Reg. 28560-01 (proposed June 20, 2018) (to be codified at 24 C.F.R. pt. 100).

[86] Woellert, s*upra* note 83.

[87] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854-01 (proposed Aug. 19, 2019) (to be codified at 24 C.F.R. pt. 100).

[88] *Id*. at 42857.

[89] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60288-01 (proposed Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100).

HUD has made the standard [disparate impact] basically worthless by setting too high a bar to prove discrimination."[90] In the discussion of the draft rule, HUD took special note of the significance of "algorithmic models to assess factors such as creditworthiness, (that) should be provided a safe harbor."[91] However, this general deference to any algorithm with non-discriminatory characteristics was dropped in the final rule.[92] Not surprisingly, several challenges have been filed on the final rule and are in their early stages.[93] Clearly, this latest rule-making round recognizes that credit score is potentially impactful to insurers and homeowners insurance, and leaves room for a state-action defense which previous appellate court decisions appeared loath to provide.

IV. CREDIT SCORE AND ITS IMPACT OF AVAILABILITY AND AFFORDABILITY

In part, some of the roots of credit score issues hark back to the early years of federal assistance for housing costs and its contribution to the establishment of a dual credit system. This duality has contributed to several of the factors that I consider in Part VI for possible exclusion from credit scoring systems.[94]

Lisa Rice, of the National Fair Housing Alliance, points out that the federal programs and policies that have been created over time to support home ownership have largely and sometimes exclusively, benefited whites.

> The premise of the American dream is that people have the ability to work hard, obtain a safe and stable place to live, achieve upward mobility and build a legacy and inheritance to pass on to future generations. The ability to build wealth, be upwardly mobile and leave a financial legacy are deeply

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[90] Ryan Smith, *Fair Housing Groups Slam Newly Finalized Disparate Impact Rule Change*, MPA MAG (Sept. 28, 2020), https://www.mpamag.com/news/fair-housing-groups-slam-newly-finalized-disparate-impact-rule-change-234630.aspx.

[91] 84 Fed. Reg. at 42859.

[92] 85 Fed. Reg. at 60288.

[93] *See* Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urb. Dev., No. 3:20-cv-11765-MGM (D. Mass. Sept. 28, 2020); Open Cmtys. All. v. U.S. Dep't of Hous. & Urb. Dev., 3:20-cv-01587-JBA (D. Conn. Oct. 22, 2020); Nat'l Fair Hous. All., Inc. v. Carson, No. 4:20-cv-07388-JSW (N.D. Cal. Oct 22, 2020).

[94] Such might include information on the source of credit extended to a borrower and examining all other factors used in developing a credit score as to whether they reflect attributes of the dual system.

> connected to one's opportunity to purchase a home and build equity as a holder of that asset.[95]

In the depression period, the federal Home Owners Loan Corporation (HOLC) was established in 1933 to provide for refinancing and reduce the rate of home foreclosures. As part of its loan underwriting process, appraisers were instructed to assess communities and to consider a neighborhood's racial composition to determine the security of the neighborhood for federal financing assistance. Black neighborhoods invariably received the lowest ratings.[96] The Federal Housing Administration (FH Admin) program was created in 1934 to provide federal insurance for mortgage loans originated by private lenders. This program picked up on the mapping system initially developed by the HOLC. An economist working for the FH Admin even developed a coding system that rank ordered neighborhoods with English, Germans, Scotch, Irish and Scandinavians at the top and Negroes and Mexicans at the bottom.[97] Of significance was the high value placed on homogeneous neighborhoods and the usage of racially restrictive covenants in deeds.[98] In the post-World War II period, the HOLC practices continued and new suburban areas were required to have restrictive covenants to obtain the highest A or B ratings. Thus, the HOLC and the FH Admin solidified the association between risk and race.[99]

Rice succinctly summarizes:

> The result of centuries of misguided beliefs, practices, policies and laws, our financial system has grown into a complex matrix of products, rules, tools, formulas and infrastructures that continue to perpetuate two different mechanisms for extending credit to people. The dual financial market was, in part, developed by the ways our government distributed land and homeownership opportunities to people, largely based on race. It was established by how our government supported credit access to different consumers based, again, upon race. America's

[95] Rice, *supra* note 1, at 77.
[96] *Id*. at 78.
[97] *Id*. at 81.
[98] *Id*. at 79–82.
[99] *Id*. at 85.

> bifurcated financial market was a product of engineering by our government and the private market.[100]

A dual system of credit plays a key role in directly influencing home ownership and its financing as well as down-stream impacts, specifically credit score as it pertains to insurance. Banking services that were available for whites were not generally available to emancipated slaves who relied mostly on the Freedman's Bank which was only cursorily regulated and limited to only taking deposits and unable to make customer loans.[101] While mainstream financial products were largely available to white customers, an alternative market arose for the marginalized Black clientele. The products in the traditional sector were generally more regulated and thus safer for customers while those developed for other customers, such as payday loans and personal finance companies, were often unsafe. These alternative products typically engender high delinquency rates.[102] Further, even when consumers of such alternative products perform well on repayment, some of these entities do not provide information to credit bureaus, thus increasing the number of individuals who remain credit invisible.[103] Thus, they do not get to reap the benefits of a demonstrated positive financial history. Also, nothing precludes these secondary mechanisms from the less costly path of just reporting negative information.[104] Finally, it has been noted that the type of credit, when it is reported, can negatively impact one's credit score as is the case with borrowings from finance companies as contrasted with deposit taking banks.[105]

The use of credit score and possible impact on different races has been considered by several insurance regulators and by the National Association of Insurance Commissioners. It has also been considered by the Federal Trade Commission (FTC). Findings of a 2004 study by the Texas Department of Insurance had findings that significantly frame the issue under consideration here. Using insurance company data on customers and matching it against information supplied by the Texas motor vehicle department (i.e. self-reported race data on drivers and a Hispanic surname match for ethnicity), the study found that there were patterns of difference among different racial groups with Blacks and Hispanics having worse

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[100] *Id*. at 88.
[101] *Id*. at 89.
[102] *Id*. at 92.
[103] *Id.* at 98.
[104] *Id*.
[105] *Id*. at 99.

scores than whites and Asians. However, the report also substantiated a strong relationship between credit score and claims experience for auto and homeowner's insurance. Thus, the department concluded that the results were actuarially supported and not unfairly discriminatory under Texas law.[106] In a final report the next month, the Insurance Commissioner pointed out that, in setting policy, he had to consider the distinction between unfair discrimination and intentional discrimination. He advised that underwriting and rating classifications are not "unfair" under Texas law if actuarially supported. He concluded that he could not ban "a practice that has a disproportionate impact if it produces an actuarially supported result and is not unfairly or intentionally discriminatory."[107] He invited the legislature to consider this question– a clash between actuarial fairness and what is just from a public policy perspective–if it so desired. The legislature has not taken up this offer as the Texas Department of Insurance website currently states that insurers may use credit information for the sale and rating of insurance.[108]

In 2007 the FTC released a report on the use of credit-based scores for auto insurance. The press release summarizing the results said:

> The study found that these scores are effective predictors of the claims that consumers will file. It also determined that, as a group, African-Americans and Hispanics tend to have lower scores than non-Hispanic whites and Asians. Therefore, the use of scores likely leads to African-Americans and Hispanics paying relatively more for automobile insurance than non-Hispanic whites and Asians.[109]

A similar study on homeowner's insurance was expected the following year. As recently as January 2014, there were reports that this report would be issued shortly but it has not surfaced as of now.

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[106] TEX. DEP'T. OF INS., *supra* note 57, at 3–4.

[107] Cover Letter from Jose Montemayor, TEX. DEP'T OF INS., SUPPLEMNETAL REPORT TO THE 79TH LEGISLATURE: USE OF CREDIT INFORMATION BY INSURERS (Jan. 31, 2005).

[108] *Credit Scoring and Insurance*, TEX. DEP'T OF INS., https://www.tdi.texas.gov/credit/index.html (last updated Sept. 25, 2020).

[109] *FTC Releases Report on Effects of Credit-Based Ins. Scores*, FTC (July 24, 2007), https://ftc.gov/news-events/press-releases/2007/07/ftc-releases-report-effects-credit-based-insurance-scores.

On a national level, the National Association of Insurance Commissioners (NAIC) has studied this issue and held hearings in 2009 where industry representatives and consumerists had a chance to weigh in.[110] Commissioner Joel Ario (PA) noted that "[credit score] doesn't fall on all populations equally"[111] (no factor would) "but this particular one falls particularly disproportionately on certain minority groups . . . the kind of constituencies that we, as regulators, are most worried about in terms of affordability and availability of insurance."[112] In response, a speaker representing the American Insurance Association made these points: 1) ninety percent of one particular company's customers paid less or were unaffected due to credit score; 2) eighty percent of insureds would pay more if credit score was banned; and 3) the effectiveness of credit score allowed insurers to offer coverage with confidence to many more applicants.[113] Most recently, the NAIC has engaged in this issue by stating its opposition to the Preventing Credit Score Discrimination in Auto Insurance Act of 2019[114] asserting that most states limit the use of credit score and vigilantly oversee its use to guard against discriminatory impact on certain classes of policyholders and emphasizing that remedial actions in this area should be led by the states.[115]

Broadly stated, one can synthesize two broad concepts from these deliberations that ultimately provides the frame for analysis. First, in a pure sense, the factors that make up credit score, as it is used, generally correlates with loss results. As such, its use provides a less expensive product for more insureds. Second, the factors that make up credit score and the algorithms that deliver the score have a disparate impact on certain marginalized groups. As identified by the Texas Commissioner of Insurance in 2005, we see two supportable propositions. For the most part, and except where banned by statute, regulators have come down on the side of allowing the use of credit

[110] Public Hearing, Prop. & Cas. Ins. (C) Comm. Mkt. Regul. & Consumer Affs. (D) Comm., The Use of Credit-Based Insurance Scores (June 15, 2009), https://www.naic.org/documents/committees_c_090615_public_hearing_transcript.pdf.

[111] *Id*. at 1–2.

[112] *Id*.

[113] *Id*. at 6.

[114] Preventing Credit Score Discrimination in Auto Insurance Act, H.R. 1756, 116th Cong. (2019).

[115] Issue Brief, Nat'l Ass'n of Ins. Comm'rs., Use of Insurance Credit Scores in Underwriting (July 2019), https://www.naic.org/documents/government_relations_190507_credit_based_scores.pdf

score, as long as it is not the sole determinant of action, acknowledging the fact that this works for the greater number of insureds. However, consideration through the lens of CRT may afford a different result and point towards a new public policy.

V. CRITICAL RACE THEORY

In this paper, I consider questions of possible inappropriate discrimination in the use of an otherwise legal insurance underwriting and pricing tool, and I apply the analytical approach of CRT for a richer and more nuanced analysis. This approach lends clarity to my conclusions and helps determine whether the suggested remedial tools for making a positive impact are legitimate. As the debate to date on the use of credit score smacks of color blind analysis and conclusions, CRT offers a different approach and, if determinative of some of the open questions, suggests avenues for remedial regulatory action.

We live in a post-civil rights era. A mantra of color blindness prevails and collides with "the intrinsic and ineluctable presence of racial rule and racial domination."[116] CRT arose as an analytical tool to confront this collision. In part, it rejects the primacy of color blindness and neutrality. It gives voice to knowledge of historic oppression and recognizes the overwhelming power of racism as a hegemonic force. It acknowledges the existence of race consciousness as a shield to preserve the system as it is and also serves as a tool for those who would oppose it. Foundationally, it accepts that race is a social and not biological construct. It also takes a needs-based rather than rights-based approach to any ultimate determination.[117]

Gloria Ladson-Billings and William Tate provided a brief summary of the key elements of CRT in summarizing its standard features as described by Delgado: 1) racism is not merely isolated acts but endemic to American life and ingrained legally, culturally, and psychologically; 2) civil-rights laws must be reinterpreted as these laws are often ineffectual and undermined; 3) claims of legal neutrality, objectivity, color blindness, and meritocracy should be challenged as they serve to camouflage the interests of those who are dominant in society; 4) legal doctrine must be reformulated

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[116] RACE LAW STORIES xiii (Rachel F. Moran & Devon W. Carbado eds., 2008).

[117] For a complete treatment and introduction to critical race theory see KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2019).

to reflect the views of marginalized people; and 5) stories and personal narratives should be used to illuminate this process.[118]

Ultimately CRT calls upon us to consider the primary question of fairness and what is just from a different perspective and challenges the majority's own primacy as the chief concern. The appealing ethical construct of Utilitarianism which holds "that the greatest happiness of the greatest number should be the guiding principle of conduct[,]"[119] is not sustainable under CRT review.

Eddie S. Glaude, Jr. suggests that we consider this issue from the perspective of what "white supremacy" is and what it is not. While it "conjures images of bad men in hooded robes who believe in white power . . . that is not quite what [he] mean[s] . . . white supremacy involves the way a society organizes itself, and what and whom it chooses to value."[120] Glaude points out that "no matter our stated principles or how much progress we think we've made, white people are valued more than others in this country, and that fact continues to shape the life chances of millions of Americans."[121] This is the nature of the value gap that drives so much of the disconnect between maintenance of the status quo and confronting what, arguably, must be addressed.

The value gap has long standing roots. In the post-reconstruction *Civil Rights Cases*, Justice Bradley framed the notion suggesting nothing more needs to be done when he said:

> [W]hen a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws.[122]

As Glaude suggests,[123] we can find an echo of this today in the language of Justice Roberts in *Shelby County, Alabama v. Holder* on voting

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118 Gloria Ladson-Billings & William F. Tate IV, *Toward a Critical Race Theory of Education*, 97 TCHRS. COLL. REC. 47, 52 (1995).

119 *Utilitarianism*, Oed.com, https://www-oed-com.ezproxy.lib.uconn.edu/view/Entry/220768?redirectedFrom=Utilitarianism#eid (last visited Oct. 18, 2020).

120 EDDIE S. GLAUDE, JR., DEMOCRACY IN BLACK: HOW RACE STILL ENSLAVES THE AMERICAN SOUL 30 (2016).

121 *Id*. at 31.

122 109 U.S. 3, 57 (1883).

123 GLAUDE, *supra* note 120, at 41.

rights where he said "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."[124] Further, Justice Roberts, in an effort to speed matters along to a period of post-racial consciousness, asserted in *Parents Involved in Community Schools v. Seattle School District No.* 1 that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[125]

In both of these decisions there is apparently a process of erasing from history what inconveniently would have led to a different conclusion. Part of what one does in considering issues through the lens of CRT is to consciously decide what we need to remember and to confront what we have chosen. The opposite, to use the phrase that Glaude ascribes to Toni Morrison, is to "disremember."[126] Applying "disremembering" to reach legal conclusions may completely reframe what may have appeared on the surface to be fair-minded decisions. As Glaude notes: "How we collectively remember is bound up with questions of justice. Or, to put the point differently, what we choose to forget often reveals the limits of justice in our collective imaginations."[127] Also, "[r]emembering our national sins serves as a check and balance against national hubris. But when we disremember . . . we free ourselves from any sense of accountability."[128]

The recognition and acceptance that there is an operative value gap informs consideration of an issue when CRT analysis is used. Glaude suggests what would be most transformative is "[a] revolution of value [that] upends the belief that white people are more valued than others."[129]

Of particular relevance here is an analysis of how credit score for homeowner's insurance can be viewed as a racialized tool in its usage in a property context. As Ladson-Billings and Tate have pointed out, in considering Bell's writings, individual rights have long been connected with property rights. "From the removal of Indians (and later Japanese Americans) from the land, to military conquest of the Mexicans, to the construction of Africans as property, the ability to define, possess, and own property has been a central feature of power in America."[130]

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[124] 570 U.S. 529, 535 (2013).
[125] 551 U.S. 701, 748 (2007) (plurality opinion).
[126] GLAUDE, *supra* note 120, at 46.
[127] *Id.*
[128] *Id.* at 188.
[129] *Id.* at 182 (emphasis omitted).
[130] Ladson-Billings and Tate, *supra* note 118, at 53 (citation omitted).

With the recent presidential election, the prospect for consideration of whether the FHA can be applied to insurance and, if so, whether credit score should be banned may be closer to a resolution. Pursuant to a Memorandum issued by President Biden on January 25, 2021, the Secretary of Housing and Urban Development was ordered to "take all steps necessary to examine the effects of the September 24, 2020, rule entitled 'HUD's Implementation of the Fair Housing Act's Disparate Impact Standard.'"[131]

It does not seem likely that any move contemplated here will be grounded in the notion of interest convergence as outlined by Professor Derrick Bell. Bell said that "[t]he interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[132]

Finally, consideration from a CRT perspective requires that we note the significance housing (shelter) has as a basic human need. Accepting that the use of credit score will be shown to be impactful on the cost of housing due to the mandated purchase of insurance when a mortgage loan is involved, CRT requires that we pay more than lip service to considering what actions will remove this obstacle to satisfying this basic human need.

In sum, consideration of this issue from a CRT perspective empowers regulators, if they can be moved to do so, to act on credit score usage for homeowner's insurance in a way that goes beyond a narrow view of what otherwise would be justified as a purely actuarial decision. It empowers the exclusion of a tool that is not justified based on recognizing that a negative value placed on minorities is embedded in historic patterns that have led to that result. As was framed by the Insurance Commissioner of Texas, policymakers should take up this possible clash between actuarial fairness and a just public policy. Viewed through a CRT lens, actuarial fairness here may be neither fair nor just.

VI. THE POSSIBLE ROLE DATA ON RACE MAY PLAY IN THIS DEBATE AND OTHER SUGGESTIONS

As has been noted above, the insurance industry has asserted and it is generally accepted by regulators, that the use of credit score makes homeowner's insurance more affordable for a large number of insureds at

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[131] Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 2021 DAILY COMP. PRES. DOC. 90 (Jan. 26, 2021).

[132] Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

the cost of increased premiums for those with lower scores. Expecting those who have enjoyed the benefits of this approach to voluntarily forgo this seems unlikely. Interest convergence, as described by Bell, is not going to be found.

This paper was prepared at a time when the political likelihood of resolving these issues by HUD or by legislation, that must pass the Senate, appeared to be remote. Progress in bringing this to a definitive resolution was advancing during President Obama's administration with a proposed rule finalized in the closing months of his term in office. The past administration and leadership at HUD, and its pending regulation as well as litigation challenging the 2013 and 2016 rules, did not auger well for a positive regulation becoming effective. The recent election of President Biden and narrow control of the senate by the Democratic Party may portend a change at the federal level.

State insurance regulators can, if they have the will, advance this debate by using tools at their disposal to resolve the question that has not been answered definitively through all of the litigation to date. Is there unassailable data that shows the use of credit score has a disparate impact on people of color? The Texas study noted above suggests that it does, as does the FTC study on auto insurance. However, the FTC study was inferential and not directly tied to a database of customers and applicants.

In 1994, the California Department of Insurance required by regulation that insurers commence reporting information on policyholders that would include race and national origin information where such info was voluntarily supplied by the customer.[133] This requirement could be applied to such personal lines of coverage as automobile and homeowner's insurance. The form requesting this info included a statement to the effect that: 1) the information was intended to allow the Department to monitor the insurers responsibility to meet the needs of underserved communities; 2) the policyholder is not required but encouraged to supply the requested information; and 3) the insurer may not use the information for underwriting or rating purposes. However, the program did not yield information deemed actionable by the Department. In February 2017, the Department released a draft set of revisions that, if effectuated, will eliminate the collection of the demographic information. In the proposal it cites the voluntary response rate

[133] CAL. CODE REGS. tit. 10, § 2646.6 (1994) (West).

as being poor.[134] As of January 2021, this change has not been placed into effect. It should be noted that California is one of a small number of states that does not allow for the use of credit score at all in the insurance underwriting or rating process. Therefore, even with a more robust response rate from applicants in addition to policyholders, this database would not have been germane to the matters under consideration here. However, it does point to the underlying legitimacy of seeking such information.

Subject to significant data collection hurdles, this methodology could be deployed in states that allow for the use of credit score to answer with much greater certainty the question of disparate impact in the use of credit score for homeowner's insurance. Anticipating questions of whether enough data will be collected to properly consider this question, we can look to the way lenders obtain similar information to enable compliance with the Home Mortgage Disclosure Act[135] which requires lenders to collect demographic information on applicants. One of the requirements of the Dodd-Frank[136] legislation was that, starting in 2018, credit information on the applicant must also be supplied.

With reasonable effort, it is hoped that a definitive view may be reached on the question of the disparate impact of credit score on marginalized populations purchasing homeowner's insurance. Armed with this information, regulators can reasonably be challenged to use the CRT lens to determine if credit score, while perhaps benefiting a mass of insureds, should be eliminated from usage, much as separate tables for rating whites and Blacks were eliminated from usage in the life insurance industry years ago–notwithstanding the potential marginal increase in life insurance rates it created for white applicants.

Failing such general action, I urge regulators to consider several steps that may significantly soften the impact of credit score on such disadvantaged populations. First, credit score factors that are reflective of the negative impact of the dual credit system should be stricken from use. An example would be negative treatment due to the source of any credit extended to a borrower (e.g. payday lenders or finance companies). All factors used in developing a credit score should be qualitatively considered as to whether or not the factor reflects a legacy of the dual system. Second,

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[134] State of California Department of Insurance, Draft, Summary of Proposed Revisions to the 2017 Community Service Statement and Fire Availability Data Call (Feb. 1, 2017) (on file with author).

[135] Home Mortgage Disclosure Act of 1975, s*upra* note 20.

[136] Dodd–Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301-5612 (2010).

subject to the decision of a renter, experience in making timely rental payments should be reported to and considered in developing a credit score. As was pointed out in 2017 by New York City Comptroller Scott Stringer, in a city of renters this is "an issue of inequality" and would benefit credit scores for seventy-six percent of such tenants.[137] Finally, insurers should consider the adoption of supplements for credit score that would consider bank account balances and cash management behavior. The developers of these scores assert that such features could well serve individuals who currently fall into the subprime range for credit score and is viewed favorably by such consumer advocates as the National Consumer Law Center.[138]

VII. SUMMARY AND RECOMMENDATIONS

I have explored the significance of homeownership in the U.S. as a form of wealth accumulation and legacy transference. The history of property rights and how race considerations inform conceptions of property rights makes this issue, specifically in the context of homeowner's insurance, even more meaningful. As such, the use of credit score, which may impact the overall homeowner's price equation, becomes a central consideration, even if not the largest consideration, but a consideration nonetheless.

Housing is a significant factor in a person's life outcomes. However, homeownership and the credit score necessary to achieve and afford it has been undermined by a system of dual credit which traces its roots back to the immediate post-Civil War period; it plays through to federal programs and agencies created during the Great Depression and continues into the post-World War II period in which housing and suburbanization boomed. This set back Black and other minority groups in their efforts to acquire property at an affordable price, and build credit records which would aid in that effort, as well as influencing other spheres such as credit score for homeowner's insurance purchase and pricing calculations.

Regulators have available tools to directly answer any remaining debate over the likely disparate impact of credit score on marginalized groups. Armed with this information, they can act to ban the use of credit score as other inappropriate tools have been banned in the past. In the

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137 Nikita Stewart, *Comptroller Wants Paying Rent on Time to Count Toward Credit Score*, N.Y. TIMES (Oct. 22, 2017), https://nyti.ms/2gYeOyn.

138 Ann Carrns, *New Type of Credit Score Aims to Widen Pool of Borrowers*, N.Y. TIMES (Oct. 26, 2018) https://www.nytimes.com/2018/10/26/your-money/new-credit-score-fico.html.

absence of a willingness to so act, they can move on a more limited basis to make the use of credit score less objectionable by stripping away features that reflect the legacy of a dual credit system and, likely, soften the ongoing deleterious impact of credit score as used for homeowner's insurance.

HUD should initiate a study of homeowner's insurance similar to the 2007 FTC study on auto insurance. Such a study may provide some definitive findings on the existence of disparate impact on the use of credit score.

The public policy challenge remains clear. The use of credit score as a tool for underwriting and pricing homeowner's insurance creates an apparent clash between actuarial fairness and a just public policy. With CRT we may ultimately conclude that such a tool is neither fair nor just.